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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

THE CELOTEX CORPORATION and
CAREY CANADA INC., *et al.*,
Petitioners

v.

SCHOOL DISTRICT OF LANCASTER, *et al.*,
Respondents

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

HERBERT B. NEWBERG
(Counsel of Record)
HARVEY S. KRONFELD
GERALD WALLERSTEIN
HERBERT B. NEWBERG, ESQ., P.C.
227 S. 6th Street
Suite 200
Philadelphia, PA 19106
(215) 922-4740

Attorneys for Respondent
Class Representative Barnwell
School District No. 45

DAVID BERGER
(Counsel of Record)
DANIEL BERGER
RUTHANNE GORDON
SHELDON V. TOUBMAN
LORI B. LASSON
DAVID BERGER ATTORNEYS AT LAW
1622 Locust Street
Philadelphia, PA 19103
(215) 875-3000

Of Counsel:
CHARLES ALAN WRIGHT
727 E. 26th Street
Austin, TX 78705
(512) 471-5151

Attorneys for Respondent
Class Representatives School District of Lancaster, Manheim Township School District, Lampeter-Strasburg School District, Board of Education of the Memphis City Schools and Napa Valley Unified School District

ARNOLD LEVIN
LEVIN & FISHBEIN
320 Walnut Street, Suite 600
Philadelphia, PA 19106
(215) 592-1500

STANLEY J. LEVY
LEVY, PHILLIPS & KONIGSBERG
90 Park Avenue
New York, NY 10016
(212) 972-1480

ALVIN B. LEWIS, JR.
HARTMAN, UNDERHILL & BRUBAKER
221 E. Chestnut Street
Lancaster, PA 17602
(717) 299-7254

W. ROBERT MORGAN, SR.
MORGAN, MORGAN, TOWERY, MORGAN & SPECTOR
210 S. First Street
San Jose, CA 95113
(408) 215-7677

DANIEL A. SPEIGHTS
304 Lee Avenue
Hampton, SC 29924
(803) 943-4444

EDWARD J. WESTBROOK
BLATT & FALES
174 E. Bay Street, Suite 100
P.O. Box 1137
Charleston, SC 29402
(803) 577-6747

E. ROBERT WRIGHT
THOMAS, SNELL, JAMISON, RUSSELL, WILLIAMSON & ASPERGER
2445 Capitol Street
Fresno, CA 93721
(209) 442-0600

FRANK J. DAILY
QUARLES & BRADY
411 E. Wisconsin Avenue
Milwaukee, WI 53202-4497
(414) 277-5381

Attorneys for Respondent-Plaintiffs

August 29, 1986

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INTRODUCTION

This response is filed by class plaintiffs in the above-captioned proceeding in opposition to the petition by nine of some 50 defendants in this litigation for a writ of certiorari to the United States Court of Appeals for the Third Circuit, to review that portion of its judgment in *In re School Asbestos Litigation,* 789 F.2d 996 (3d Cir. 1986), *reh'g denied* (June 2, 1986), which affirmed the certification of a class under Fed.R.Civ.P. 23(b)(3).[1]

The salient procedural history in this case concerns the action of two federal courts in conditionally certifying a class action involving school asbestos property damage claims. The nationwide class which was certified by the District Court below on September 28, 1984, and affirmed in part by the Third Circuit Court of Appeals in its May 1, 1986 decision, consists of all elementary and secondary schools and school districts, public and private, seeking to recover from asbestos companies the costs of remedial action made necessary by the presence of asbestos in school buildings, as well as punitive damages. In its Pretrial Order No. 20, the District Court certified both a voluntary class under Fed.R.Civ.P. 23(b)(3) for compensatory damages and a no opt-out "mandatory" class under Fed.R.Civ.P. 23(b)(1)(B) for punitive damages. *In re Asbestos School Litigation,* 104 F.R.D. 422 (E.D. Pa. 1984) (J.A.0000327-28).[2] The Third Circuit vacated the 23(b)(1)(B) class but affirmed the 23(b)(3) class. *In re School Asbestos Litigation,* 789 F.2d 996 (3d Cir. 1986) (hereinafter, "*School Asbestos*"), *reh'g denied* (June 2, 1986).

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[1] Other major defendants did not challenge the Rule 23(b)(3) class certification in the District Court below or join in any appeals to the Third Circuit or in the instant petition.

[2] All citations to the Joint Appendix submitted by the parties in the appeals to the Third Circuit Court of Appeals are referenced as "(J.A.)."

According to the United States Environmental Protection Agency ("EPA"), asbestos-containing construction products were utilized, until December 31, 1978 (when they were banned as a construction material),[3] in the construction of public and private schools, as a fire retardant and acoustical insulation material on school building surfaces, such as ceilings and walls, and on unexposed foundation structures, and as insulation for pipes and boilers.[4] The claims of the schools certified for class treatment under Rule 23(b)(3) consist essentially of damage claims to recover the costs of asbestos remedial action with respect to such asbestos-containing construction materials. Remedial action consists of the testing and analysis of construction materials for the presence of friable asbestos-containing material, operations and maintenance programs to control friable asbestos material (including notice to employees and students), and more substantial abatement action such as removal, encapsulation and enclosure.[5] No matter what form the remedial action takes, it is based upon the common denominator of the *presence* of friable asbestos-containing materials in the schools.[6]

The magnitude of the presence of friable asbestos-containing materials in schools has been recognized to be substantial. Subsequent to the class certification decision of the District Court, the EPA published a study of the presence of friable asbestos materials in the nation's schools.[7] According to

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[3] *See, e.g., Final Rule: Asbestos; Friable Asbestos-Containing Materials in Schools; Identification and Notification,* 47 Fed. Reg. 23360, 23366, *codified in* 40 C.F.R. § 763.100, *et seq.* (May 27, 1982) (hereinafter, "*Final Rule*") (J.A.0001033).

[4] *See, e.g., Final Rule,* 53 Fed. Reg. 23361 (J.A.0001028).

[5] *See, e.g.,* the EPA's 1985 Edition of its *Guidance for Controlling Asbestos-Containing Materials in Buildings,* at pages S-1 - S-3 (hereinafter, "1985 EPA Guidance Document") (Appendix 1 to Class Plaintiffs' Appellee Brief to the Third Circuit Court of Appeals, filed Sept. 5, 1985).

[6] *See, generally,* summary of 1985 EPA Guidance Document, at S-1 - S-3 (Appendix 1 to Class Plaintiffs' Appellee Brief to the Third Circuit Court of Appeals).

[7] *See Evaluation of the EPA Asbestos-in-Schools Identification and Notification Rule* (Office of Pesticides and Toxic Substances, Exposure Evaluation Division) (October 1984) (excerpts included in Appendix 2 to Class Plaintiffs' Appellee Brief to the Third Circuit Court of Appeals).

the EPA's study, some 31,000 private and public schools were affected.[8]

The Asbestos School Hazard Detection and Control Act of 1980, 20 U.S.C. § 3601, *et seq.*, directed the United States Attorney General to prepare a report on the legal responsibility for the costs of asbestos abatement remedial action. In 1981, the Attorney General filed his report (J.A.0000705-805), recommending that litigation be instituted against the asbestos industry on behalf of the schools to recover the costs of remedial action, including testing and analysis (J.A.0000720). *See The Attorney General's Asbestos Liability Report to the Congress, Pursuant to Section 8(b) of the Asbestos School Hazard Detection & Control Act of 1980,* page vii (Sept. 21, 1981). Following the Attorney General's Report, this class action litigation ensued. There is a strong likelihood that asbestos *property damage* litigation, following upon the heels of the Attorney General's Report, if not permitted to be litigated on a class action basis, will repeat the history of the asbestos *personal injury* litigation, with disastrous consequences.[9]

Thus, the action of the District Court and of the Third Circuit, like that of the district court in *Jenkins v. Raymark Industries, Inc.*, 109 F.R.D. 269 (E.D. Tex. 1985) (certifying asbestos personal injury class), as affirmed in *Jenkins v. Raymark Industries, Inc.*, 782 F.2d 468 (5th Cir.), *reh'g denied*, 785 F.2d 1034 (1986), was an attempt to grapple with the

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[8] *Id.* at pages 2-3. Prior to the issuance of Pretrial Order No. 20 (J.A.0000327-28), plaintiffs submitted to the District Court below, as Exhibit J (J.A.0000939-68) to their motion for class certification (J.A.0000485-91), a September 15, 1983 U.S. Department of Education report to Congress on asbestos in the schools, which estimated that "14,000 schools contain asbestos hazards requiring abatement . . . [and that] the total estimated cost of asbestos removal from school buildings would be $1.4 billion." (J.A.0000968).

[9] The certification of the instant class has tolled the running of the statute of limitations for all class members. *See Chardon v. Fumero Soto*, 462 U.S. 650, 654 (1983); *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 550-51 (1974). Thus, there has been no need for individual schools to file claims to protect themselves in this regard. Decertification of the class, however, would almost certainly open the floodgates.

morass of asbestos litigation, which has caused an unprecedented backlog in the courts of this country. Recognizing the intractible problems that case-by-case litigation in the personal injury asbestos litigation has engendered, as well as the "staggering costs that the asbestos personal injury litigation has generated", 104 F.R.D. at 433 (J.A.0000311), the District Court conditionally certified a Rule 23(b)(3) class for compensatory damages. While pragmatically noting that the management of the litigation as a class action was not "wholly without difficulty", 104 F.R.D. at 434 (J.A.0000314), the District Court believed that, at this time, a Rule 23(b)(3) class action should be attempted, since, "[n]otwithstanding the difficulty, 'the proposed class action appears superior to the only existing alternative, which is repetitive individual litigation.'" 104 F.R.D. at 434 (J.A.0000315), *quoting Wolgin v. Magic Marker Corp.*, 82 F.R.D. 168, 179 (E.D. Pa. 1979).

On appeal, the Third Circuit, exercising full appellate jurisdiction under 28 U.S.C. § 1292(b) over the entire class certification order, vacated the mandatory Rule 23(b)(1)(B) class for punitive damages and upheld the District Court's denial of certification of a mandatory Fed.R.Civ.P. 23(b)(2) class (three defendants—none of the petitioners herein—sought a review of that denial), recognizing that these two aspects primarily involved questions of law.[10] However, it also recognized that the District Court had "determined that the class action was superior to the only existing alternative—repetitous individual litigation". 789 F.2d at 1000. Accordingly, relying in part upon the "background of the asbestos scene," *id.* at 1000, and acknowledging that its decision therefore was based in part upon "the highly unusual

[10] It was a discrete legal question involving only the Rule 23(b)(1)(B) class certification—namely, the possible violation of the Anti-Injunction Act, 28 U.S.C. § 2283—that was the basis for the appeal under 28 U.S.C. § 1292(b). Although the Third Circuit granted the appeal on this issue, under Third Circuit precedents, that court, when granting a § 1292(b) appeal from a district court's order, generally reviews all aspects of the order. *See School Asbestos*, 789 F.2d at 1002.

nature of asbestos litigation", *id.* at 1011,[11] the Third Circuit affirmed the District Court in its exercise of discretion in certifying the Rule 23(b)(3) class.[12]

It is only *this* discretionary action by the District Court, involving a determination on matters with which the district court "generally has a greater degree of expertise and familiarity than does an appellate court", 789 F.2d at 1011, an action conditioned upon the District Court's continued view that manageability problems can be overcome, *id.*,[13] that the petitioning defendants, in their July 29, 1986 Petition for a Writ of Certiorari, seek to have this Court review.

The Court should deny the writ of certiorari requested by petitioners because the Third Circuit's affirmance of the District Court's class certification determination presents no overriding issue of law or conflicts among the Circuits which requires review by this Court. Class certification in this litigation takes place in the unprecedented context of asbestos-related litigation which has severely taxed the capacities of both the federal and state judicial systems, and which has proved to be ineffective in permitting just and speedy compensation to victims. Two

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[11] The Third Circuit emphasized, as had the District Court, that "the undeniable limitations of the 'one-on-one' approach in coping with the massive onset of [asbestos] claims now in the courts have caused serious and justified concern", 789 F.2d at 1000-01, and that "[i]nefficiency results primarily from relitigation of the same basic issues in case after case," *id.* at 1001, concluding that its "necessarily brief . . . sketch of the background of asbestos litigation is enough to show that this is not a routine class action", *id.*

[12] On June 2, 1986, the Third Circuit denied petitions for rehearing and rehearing *en banc* from its May 1, 1986 decision.

[13] The Third Circuit, "point[ing] out the critical fact that certification is conditional", and that the District Court can "decertify if the issues it has classifed as substantial later appear insufficient to justify the class procedure", found that a reversal of the certification would be improper "before the district judge has had an opportunity to put the matter to a test". 789 F.2d at 1011.

federal courts, in well-supported and well-reasoned opinions, have independently concluded that the procedural device of a class action, an "innovation" for asbestos-related litigation, may prove to be of utility in assisting in resolving, or at least helping to contain, this mushrooming litigation, and thus should be attempted on a conditional basis.

The class certification decision and its affirmance by the Third Circuit were exercises of the sound discretion of both Courts in accordance with this Court's unwaivering rule that class certification decisions should be deferred to the broad discretion of the trial court, *Cooper v. Federal Reserve Bank of Richmond,* 467 U.S. 867, 104 S.Ct. 2794, 2802 (1984); *Califano v. Yamasaki,* 442 U.S. 682, 703 (1979), to facilitate and effectuate the Rule 23 policies of judicial economy, *see Gulf Oil Co. v. Bernard,* 452 U.S. 89, 99 n.11 (1981), and of allowing broad relief, *see Phillips Petroleum Co. v. Shutts,* ___ U.S. ___, 105 S.Ct. 2965, 2974 (1985); *Gulf Oil,* 452 U.S. at 99 n.11. Indeed, it is inconceivable that the conditional certification of a class action, under the circumstances of asbestos-related litigation, would present an issue of federal law, judicial policy or fundamental fairness warranting interlocutory review by this Court.

The Third Circuit's action herein is not unprecedented either in the asbestos area, *see Jenkins v. Raymark Industries, Inc.,* 782 F.2d 468 (5th Cir. 1986), *reh'g denied,* 785 F.2d 1034 (5th Cir. 1986) (upholding certification of district-wide class action involving approximately 893 personal injury asbestos cases), or in allowing a nationwide class action to proceed under the potentially varying products liability laws of all states and territories in the country, *see In re "Agent Orange" Product Liability Litigation,* 100 F.R.D. 718 (E.D.N.Y. 1983), *petition for writ of mandamus denied sub nom. In re Diamond Shamrock Chemicals Co.,* 725 F.2d 858 (2d Cir.), *cert. denied sub nom. Diamond Shamrock Chemicals Co. v. Ryan,* 465 U.S. 1067 (1984). More important, the petitioners' contentions that the Third Circuit's decision presents a conflict with a decision of the United States Court of Appeals for the Ninth Circuit, and that the decision somehow sanctions departures by the District Court from the accepted and usual course of judicial proceed-

ings, ignore the basic fact that the District Court's discretionary ruling on the Rule 23(b)(3) class, as upheld by the Third Circuit, was premised on a finding that this *particular* action, involving its peculiar facts, should be so certified, on a conditional basis. The District Court's application of *settled* federal procedural law to the specific facts before it, and the Third Circuit's affirmance of that application, is fully in accord with existing precedent—including that from the Ninth Circuit—recognizing that the responsibility for making the discretionary determination whether to certify such a class should rest with the district court. Thus, the petition for writ of certiorari should be rejected as nothing more than a premature request for this Court to review two lower courts' consistent, but discretionary, application of settled federal procedural law under Rule 23 to specific facts arising under state common law.

REASONS FOR NOT GRANTING THE WRIT

I.

THE THIRD CIRCUIT'S DECISION DOES NOT SANCTION AN IMPERMISSIBLE VEHICLE FOR THE ADJUDICATION OF THE INSTANT SCHOOL CLASS MEMBERS' ASBESTOS-RELATED CLAIMS

Petitioners' attempt to fit within the contours of S.Ct. Rule 17.1(a) by arguing that the Third Circuit's decision "is contrary to a long history of class action jurisprudence", and hence that it "will sanction significant departures from the accepted and usual course of judicial proceedings", Petition for Writ of Certiorari at 5, 6 (hereinafter, "Petition"), must fail. The basic support for this contention is a string cite of federal and state cases where class certification has been denied, coupled with the declaration that "courts, with rare exception, have recognized that class action treatment is inappropriate for resolution of the predominantly *uncommon* questions of fact and law inherently characteristic of products liability and toxic tort actions." *Id.* at 6 (emphasis in original). In other words, they argue that, because other courts have, on different facts, denied certification of a class in cases falling under the general category of "products liability and toxic tort actions", therefore *all* such

cases technically falling under that category inherently cannot satisfy the requirements of Rule 23.

The petitioners' argument is premised upon an erroneous understanding of the case-by-case nature of the factually-based determination whether to certify a class under Rule 23(b)(3), a matter within the sound discretion of the district court. As noted by this Court in *Cooper v. Federal Reserve Bank of Richmond,* 467 U.S. 867, 104 S.Ct. 2794, 2802 (1984), it is for the district court in the first instance to decide, as a matter of judicial administration, what issues, if any, are appropriate for class-wide treatment. *See also Califano v. Yamasaki,* 442 U.S. 682, 703 (1979) ("certification of a nationwide class, like most issues arising under Rule 23, is committed in the first instance to the discretion of the district court"); *Marshall v. Holiday Magic, Inc.,* 550 F.2d 1173, 1176-77 (9th Cir. 1977); *Bermudez v. United States Dept. of Agriculture,* 490 F.2d 718, 725 (D.C. Cir.), *cert. denied sub nom. Butz v. Bermudez,* 414 U.S. 1104 (1973).[14] Further, with respect to the findings of both a predominance of common questions and the superiority of a Rule 23(b)(3) class over individual litigation, the only findings challenged by the petitioners herein, the Third Circuit simply followed the extensive case law recognizing that the district court is as well situated as, if not better situated than, an appellate court to make these determinations. *School Asbestos,* 789 F.2d at 1011, *citing Link v. Mercedes-Benz of North America, Inc.,* 550 F.2d 860 (3d Cir.), *cert. denied,* 431 U.S. 933 (1977). *See Lerwill v. Inflight Motion Pictures, Inc.,* 582 F.2d 507, 512-13 (9th Cir. 1978); *Katz v. Carte Blanche Corp.,* 496 F.2d 747, 756-57 (3d Cir.) (*en banc*), *cert. denied,* 419 U.S. 885 (1974). Both of these determinations involve the careful weighing of the relative benefits of the two modes of litigation as they relate to the ability of the courts efficiently to rule on the claims involved.

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[14] However, in making this discretionary determination, the district court must be cognizant of the fact that "Rule 23 expresses 'a policy in favor of having litigation in which common interests, or common questions of law or fact prevail, disposed of where feasible in a single lawsuit.' " *Gulf Oil Co. v. Bernard,* 452 U.S. 89, 99 n. 11 (1981), *quoting Rodgers v. United States Steel Corp.,* 508 F.2d 152, 163 (3d Cir.), *cert denied,* 423 U.S. 832 (1975). *Accord Califano v. Yamasaki,* 442 U.S. 682, 690 (1979) ("unnecessary duplication of actions . . . the evil that Rule 23 was designed to prevent").

Petitioners have made a transparent attempt to obfuscate the discretionary nature of the Rule 23 determination through their effort to fabricate, from a scorecard of class certification denials, a *per se* rule of *law* that all "products liability and other toxic tort actions are inappropriate for class action treatment." Petition at 9. This effort ignores the numerous "products liability and toxic tort actions" and environmental cases in which class certification *was* granted,[15] as well as the numerous

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[15] *See, e.g., Jenkins v. Raymark Industries, Inc.*, 782 F.2d 468 (5th Cir.) (class of asbestos personal injury victims upheld for purposes of litigating certain defenses), *reh'g denied*, 785 F.2d 1034 (1986); *Sterling v. Velsicol Chemical Co.*, No. 78-1100, slip op., at 2 (W.D. Tenn. Aug. 1, 1986) (class seeking recovery for personal injury and property damage arising from leakage from toxic dump site); *Joseph v. General Motors Corp.*, 109 F.R.D. 635 (D. Colo. 1986) (class of purchasers of defective automobile engines); *Walsh v. Ford Motor Co.*, 106 F.R.D. 378 (D.D.C. 1985) (class of purchasers of defective automobile transmissions); *In re "Agent Orange" Product Liability Litigation*, 100 F.R.D. 718 (E.D.N.Y. 1983) (class of Vietnam veterans and their families seeking damages for injuries arising from exposure to toxic herbicide); *In re Three Mile Island Litigation*, 87 F.R.D. 433 (M.D. Pa. 1980) (classes of businesses and individuals within 25-mile radius seeking damages for economic harm due to Three Mile Island nuclear accident); *Ouellette v. International Paper Co.*, 86 F.R.D. 476 (D. Vt. 1980) (class of lakefront property owners seeking damages for economic harm caused by pollution of Lake Champlain); *Pruitt v. Allied Chemical Corp.*, 85 F.R.D. 100 (E.D. Va. 1980) (class of fisherman seeking recovery for economic harm due to water pollution); *Bentkowski v. Marfuerza Compania Maritima, S.A.*, 70 F.R.D. 401 (E.D. Pa. 1976) (class of passengers of cruise ship injured by food and/or water poisoning); *Hernandez v. Motor Vessel Skyward*, 61 F.R.D. 558 (S.D. Fla. 1973) (class of passengers of cruise ship injured by food or water poisoning); *Biechele v. Norfolk & Western Railway Co.*, 309 F.Supp. 354 (N.D. Ohio 1969) (class of property owners seeking injunction and recovery for property damage and physical injury due to emission of coal dust from defendant's coal storage facility); *Louisville & Nashville Railroad v. Wollenmann*, 180 Ind. App. 588, 390 N.E.2d 669 (class seeking damages for economic harm resulting from evacuation due to railroad tank car spilling liquid propane), *reh'g denied*, 180 Ind. App. 593, 392 N.E.2d 1000 (1979); *Lucas v. Pioneer, Inc.*, 256 N.W.2d 167 (Iowa 1977) (class of purchasers of defective corn syrup); *Millet v. Rollins Environmental Services of Louisiana, Inc.*, 428 So.2d 1075 (La. Ct. of App., 1st Cir.), *cert. denied*, 433 So.2d 153 (La. 1983) (class of residents injured by release of fumes and odors from hazardous waste disposal facility); *Danyo v. Great Lakes Steel Corp.*, 93 Mich. App. 91, 286 N.W.2d 50 (1979) (class of past and present property owners

(footnote continues)

other "mass tort" cases where class certification has been granted.[16]

Furthermore, none of the cases cited by petitioners in support of their contention that there is a *per se* rule against such class certifications supports the existence of this purported rule. For example, the precedent upon which petitioners principally rely is the decision of the United States Court of Appeals for the Ninth Circuit in *In re Northern District of California "Dalkon Shield" IUD Products Liability Litigation,* 693 F.2d 847 (9th Cir. 1982) ("*Dalkon Shield*"), *cert. denied sub nom. A.H. Robins Co. v. Abed,* 459 U.S. 1171 (1983). The very quotations from that decision which the petitioners have

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(footnote continued)

seeking injunctive relief and recovery for personal injury and property damage due to air and noise pollution caused by nearby chemical, steel, and electrical companies and municipality); *Oakwood Homeowners Association v. Ford Motor Co.,* 77 Mich. App. 197, 258 N.W.2d 475 (1977) (class of property owners seeking injunctive relief and recovery for property damage, physical injury, and risk of physical injury due to pollutants emitted by several neighboring manufacturing plants); *Board of Education of the School District of the City of Detroit v. The Celotex Corp.,* No. 84-429634 NP, slip op. (Mich. Cir. Ct., Wayne Cty. Sept. 6, 1985) (class of school districts seeking compensatory damages and equitable relief due to asbestos in school buildings); *Marks v. C.P. Chemical Co.,* No. 053,825, slip op. (Ct. of App., 8th Dist. Jan. 16, 1986) (reversing trial court's refusal to certify class of home owners injured by urea-formaldehyde insulation in their homes), *reh'g denied* (Ohio S. Ct. July 18, 1986); *Hurt v. Midrex Division of Midland Ross Corp.,* 276 Or. 925, 556 P.2d 1337 (1976) (class of owners of automobiles damaged by particulates from employer's plant); *Cipriani v. Sun Pipe Line Co.,* No. 83-03558-09-5, slip op. (Pa. Ct. C.P., Bucks Cty. Feb. 21, 1985) (class of homeowners and residents seeking compensation for property damage, present and future personal injuries and emotional distress due to ruptured oil pipeline); *Floyd v. Philadelphia,* 8 D & C 3d 380 (Pa. Ct. C.P. Phila. Cty. 1978) (class seeking recovery for personal injuries due to leak of chlorine gas).

[16] *See, e.g., In re City of Philadelphia Litigation,* No. 85-2745, slip op. (E.D. Pa. May 16, 1986) (fire); *McQuilken v. A & R Development Corp.,* 576 F.Supp. 1023, 1032 (E.D. Pa. 1983) (nuisance due to construction work); *In re Federal Skywalk Cases,* 95 F.R.D. 483 (W.D. Mo. 1982) (hotel skywalk collapse); *In re Louisville Explosions Litigation,* Master File No. C-81-0080-L(B), slip op. (W.D. Ky. Nov. 18, 1981) (explosion in city sewers); *Coburn v. 4-R Corp.,* 77 F.R.D. 43 (E.D. Ky. 1977) (fire); *American Trading & Production Corp. v. Fischbach & Moore, Inc.,* 47 F.R.D. 155 (N.D. Ill. 1969) (fire).

selected for inclusion in their petition belie the existence of any rule of law against class certifications in the products liability/toxic tort area. This decision simply notes that " '[i]n products liability actions . . . individual issues *may* outnumber common issues.' " Petition at 8, *quoting Dalkon Shield,* 693 F.2d at 853 (emphasis added). Indeed, the Ninth Circuit expressly noted that it was "not necessarily ruling out the class action tool as a means for expediting multi-party product liability actions *in appropriate cases. . . .*" 693 F.2d at 851 (emphasis added). *See also Mertens v. Abbott Laboratories, Inc.,* 99 F.R.D. 38, 41 (D.N.H. 1983) (as quoted by petitioners, Petition at 11, court, in personal injury case, found that " 'a determination in principle would serve no useful purpose in resolving the individual claims made *in this action. . . .*' " (emphasis added).[17]

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[17] The *Mertens* Court, in a passage quoted by petitioners, recognized that " 'common questions need not be dispositive of the entire action . . .' " for a predominance of common questions to be found. Petition at 11, *quoting Mertens,* 99 F.R.D. at 41. The Third Circuit also recognized that a predominance of common questions properly can be found to exist where the resolution of the common questions so identified will " 'significantly advance the resolution of the underlying hundreds of cases.' " *School Asbestos,* 789 F.2d at 1010, *quoting Jenkins,* 782 F.2d at 472-73. This test has been adopted by numerous courts, following the pragmatic interpretation of Rule 23 suggested by Professors Wright and Miller, who note that "when common questions represent a *significant aspect* of the case and they can be resolved for all members of the class in a single adjudication, there is a clear justification for handling the dispute on a representative rather than on an individual basis." 7A C. Wright & A. Miller, *Federal Practice & Procedure* § 1778, at 53 (1972) (emphasis added) (reiterated in C. Wright, A. Miller & M. Kane, *Federal Practice & Procedure* § 1778, at 528 (2d ed. 1986)). *See, e.g., Jenkins,* 782 F.2d at 472-73; *Joseph v. General Motors Corp.,* 109 F.R.D. 635, 641 (D. Colo. 1986); *Walsh v. Ford Motor Company,* 106 F.R.D. 378, 393 (D.D.C. 1985); *In re Agent Orange Product Liability Litigation,* 100 F.R.D. at 722. *See also Mertens,* 99 F.R.D. at 41, *citing* § 1778.

As further noted by the Third Circuit, assuming that only certain significant questions can be resolved on a classwide basis, it still is appropriate to certify the class, since, "[e]ven if the action thereafter 'degenerates' into a series of individual damage suits, the result nevertheless works an improvement over the situation in which the same separate suits require adjudication on liability using the same evidence over and over again." *School Asbestos,* 789 F.2d at 1008, *citing Hernandez v. Motor Vessel Skyward,* 61 F.R.D. 558 (S.D. Fla. 1973).

Thus, contrary to petitioners' contentions, the Third Circuit's comments that " 'there is a growing acceptance of the notion that *some* mass accident situations *may* be good candidates for class action treatment' and that courts are 'reassess[ing] . . . the utility of the class action in the mass tort area,' " Petition at 10, *quoting School Asbestos,* 789 F.2d at 1008 (emphasis added), hardly stand "in sharp contrast to the Ninth Circuit's discussion of this precise matter in *Dalkon Shield",* Petition at 10. *Both* courts expressly recognized that the determination whether to certify a class must depend upon an independent review of each individual case.

Similarly, petitioners' reliance upon the Note of the Advisory Committee to Rule 23 concerning "mass accidents" also cannot support the elusive "rule of law" against mass tort class certifications from which the Third Circuit's decision purportedly "departs". The Note states that "[a] 'mass accident' resulting in injuries to numerous persons *ordinarily* is not appropriate for a class action . . . ." 39 F.R.D. 69, 103 (1966) (emphasis added).[18] While, as the Third Circuit indicated, *see School Asbestos,* 789 F.2d at 1008, the Note has repeatedly been questioned, *see Jenkins v. Raymark Industries, Inc.,* 782 F.2d 468, 473 (5th Cir.), *reh'g denied,* 785 F.2d 1034 (1986); *In re Agent Orange Products Liability Litigation,* 100 F.R.D. 718, 722 (E.D.N.Y. 1983), or has been harmonized in the certification of mass tort cases, *see, e.g., Ouellette v. International Paper Co.,* 86 F.R.D. 476, 481 (D.Vt. 1980), it is clear that the Note, like *Dalkon Shield* and *Mertens,* only states a general proposition in no way suggesting that mass tort cases "inherently" cannot properly be certified for class treatment.

Thus, it is apparent that there is no "accepted and usual course of judicial proceedings" with respect to class certifications in the products liability/toxic tort area, let alone a "departure" therefrom by the Third Circuit's decision. The

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[18] The Note technically is inapposite because the instant case deals with property damage incurred due to the *risk* of personal injuries, and not varying physical injuries of potentially multiple causes. The Third Circuit noted that property damages cases, in contrast with personal injury cases, such as *Dalkon Shield,* involve diminished "emotional" aspects, as well as simplified causation, and thus are generally more appropriate for class treatment. *See School Asbestos,* 789 F.2d at 1009, 1010.

Court of Appeals applied the settled law under Rule 23 governing class certifications to the specific facts before it—a case involving property damage resulting from the presence of asbestos in the class members' school buildings. Accordingly, the fact that the Third Circuit affirmed the certification of a class action in the products liability/toxic tort area does not warrant a review by this Court under S.Ct. Rule 17.1(a).[19]

II.

THE THIRD CIRCUIT'S DECISION DOES NOT REQUIRE SUPREME COURT REVIEW BECAUSE OF ITS RECOGNITION THAT THE DISTRICT COURT, AS IN MANY TOXIC TORT ACTIONS, MUST DETERMINE WHETHER THERE IS ANY SAFE LEVEL OF EXPOSURE TO ASBESTOS FIBERS

In seeking to fit within some provision of S.Ct. Rule 17.1(a), petitioners are reduced to the argument that the Third Circuit "has sanctioned the judicial establishment, on a nationwide level, of standards governing the use of products . . . in all toxic tort and products liability cases that can be brought . . . as purported class actions", and that the establishment of such standards inherently violates the separation of powers and federalism. Petition at 12.[20] The argument erroneously pre-

[19] For the same reasons, the Third Circuit's decision involving asbestos property damage can hardly be considered to be "in conflict with the decision of another federal court of appeals [Ninth Circuit] *on the same matter* . . . ." S.Ct. Rule 17.1(a) (emphasis added). Indeed, no decision "on the same matter" has been rendered by any federal court, let alone by another Circuit, or by any state appellate court. While the court in *Board of Ed. of the School District of the City of Detroit v. The Celotex Corp.*, No. 84-429,634 NP, slip op. (Mich. Cir. Ct., Wayne Cty. Sept. 6, 1985), agreed with and relied upon the District Court herein in certifying a statewide school class, the only decision *contrary* to the Third Circuit's decision on essentially the same facts is *Cleveland Bd. of Ed. v. Armstrong World Industries, Inc.*, 22 Ohio Misc.2d 18, 476 N.E.2d 397 (Ct. C.P. 1985), involving an Ohio trial court's application of Ohio rules and a conclusion not to certify such a statewide class. If anything, these different results reflect the discretionary nature of a class certification determination.

[20] This argument begs the question, since a case can be *certified* as a class action only if the determination of central questions will apply equally to all class members (as the two courts below found it would).

sumes that a factual finding on the danger point of a toxic substance is *never* a proper factual matter for determination by the courts in any common law tort action.[21]

The absurdity of this proposition is manifest. The District Court herein, as with any state or federal court confronted with a tort case under state common law, must decide, as a factual matter, whether the product or substance which is the basis of the lawsuit does in fact present an unreasonable risk of harm. *Cf. Knippen v. Ford Motor Co.*, 546 F.2d 993, 999-1000 (D.C. Cir. 1976) (federal courts must establish standards of care for automobile safety design in common law cases brought under state products liability law, despite possible "advantages" of a "legislative approach to establishing reasonable design standards"). Such determinations, which merely apply existing law to discrete facts in a case or controversy, are at the heart of the judicial process.

Petitioners' reliance upon the fact of the *pendency* of Congressional or federal administrative action purportedly considering whether there is any safe level of exposure to asbestos fibers in school buildings, and, if so, what that level is, is similarly unfounded. As a matter within the accepted and usual course of judicial proceedings, the federal courts regularly make factual determinations under common law even though the same factual issue is being considered by, and may be the subject of prospective legislation or a regulation by, the Congress or an administrative agency. *See, e.g., Knippen v. Ford Motor Co.*, 546 F.2d 993, 999-1000 (D.C. Cir. 1976).[22] No affront to the separation of powers doctrine is presented by such factual determinations.

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[21] If petitioners' contention were correct, a common law action could never be brought involving a toxic substance the dangers of which were contested, even if the case were *not* a class action, because there would be the factual question for resolution of whether any exposure to the substance was harmful or, if not, whether a certain level of exposure was harmful, a matter assertedly within the exclusive domain of the legislature or an administrative agency.

[22] Indeed, even if such prospective legislation or regulation actually were passed or adopted, and it concluded that there *was* a safe level of exposure to asbestos fibers in school buildings, this would not relieve defendants of

(footnote continues)

The same response applies to petitioners' argument that a determination of this factual question when it also is being considered by state legislative or administrative bodies would violate "federalism". As with the alleged "separation of powers" argument, this contention ignores the basic duty of courts to decide a factual question directly brought before them in an adversary proceeding, regardless of the pending consideration of the same question by other governmental bodies.[23]

III.

THE THIRD CIRCUIT'S DECISION DOES NOT REQUIRE SUPREME COURT REVIEW BASED UPON ITS ANALYSIS OF THE PROOF THAT PLAINTIFFS PROPOSE TO OFFER TO ESTABLISH THEIR CLAIMS

The petitioners also contend that the Third Circuit's asserted failure to subject plaintiffs' claims to an analysis of the "proof [plaintiffs] propose to offer to establish those claims" renders its decision "in conflict with the decision of [other] circuits". Petition at 14, 15. In so arguing, petitioners fail to note that the Third Circuit, like these other federal circuits, *has* specifically recognized the appropriateness of this analysis in making class certification determinations under Rule 23(b)(3), and, indeed, has specifically directed the district courts in its jurisdiction to apply this analysis. *See Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 455 (3d Cir. 1977), *cert. denied*, 434 U.S.

(footnote continued)

liability to plaintiffs, since compliance with a statute or regulation cannot be the basis for establishing a lack of liability under common law. *See Complaint of Bankers Trust Co.*, 651 F.2d 160, 174 (3d Cir. 1981), *cert. denied sub nom. BP Oil, Inc. v. Bankers Trust Co.*, 455 U.S. 942 (1982); Prosser & Keeton, *Law of Torts* § 36 at 233 (5th ed. 1984); *Restatement Second of Torts* § 288 C (1965).

[23] The baselessness of petitioners' contention is underscored by their reliance upon the general policy of federalism of leaving "the various states . . . free to develop competing *solutions to complex problems*, allowing those which work well to be adopted by others as a model", Petition at 13 (emphasis added). It is not "solutions to complex problems" that the Court of Appeals recognized the District Court must determine on an across-the-board basis; rather, it must determine the discrete factual question of whether there is or is not a hazard for the purpose of establishing defendants' liability to plaintiffs.

1086 (1978). As the Third Circuit held in *Bogosian,* in determining whether common questions predominate over individual ones, the class certification inquiry focuses on the nature or method of proof likely to be offered by plaintiffs at trial in support of their claims. Further, it is precisely this analysis which the District Court undertook in certifying the instant class, *see In re Asbestos School Litigation,* 104 F.R.D. 422, 431-32 (E.D.Pa. 1984) (J.A.0000307-10), and which the Third Circuit reviewed in affirming that class certification determination. *School Asbestos,* 789 F.2d at 1009-10.

In considering the proof necessary to establish plaintiffs' claims herein, the District Court closely followed the *Bogosian* analysis, requiring a separate analysis of the nature of the proof with respect to both "violation of law" and "fact of injury" or "impact". 104 F.R.D. at 431 (J.A.0000307). Further, the District Court analyzed each of the elements of the products liability tort claims asserted herein, noting that the violation issue under *Bogosian* was equivalent to duty and breach of legal duty, and that the *Bogosian* impact issue was equivalent to factual and legal causation with the plaintiffs' injuries. *Id.* at 431-32 (J.A.0000307-10).

With respect to the "violation" issue, it found that all of plaintiffs' claims arose "out of the same common nucleus of operative facts relating to defendants' conduct and the nature of asbestos products", 104 F.R.D. at 432 (J.A.0000308), and found that the four core issues "*can be established by common proof*, which, although it may be complex, does not vary from class-member school to class-member school". 104 F.R.D. at 429 (J.A.0000301) (emphasis added). Further, with respect to the "impact" or causation issue, the District Court again applied the *Bogosian* Court's direction to analyze the *proof* to be offered in support of the plaintiffs' claims. 104 F.R.D. at 432 (J.A.0000309-10) (emphasis added).

Reviewing the District Court's decision, the Third Circuit agreed with its determination on the commonality of certain central questions, 789 F.2d at 1009-10, specifically noting that the District Court "believed that the *proof* of these matters

would not vary widely from one class member to another". 789 F.2d at 1009 (emphasis added). Accordingly, there is no merit to petitioners' contention that neither court below "focused on the proof [plaintiffs] propose to offer to establish [their] claims", Petition at 14.

Petitioners' real objection appears to be that they "differ sharply over the proof that is necessary to establish the claims alleged in the Complaint", Petition at 17, attacking the Third Circuit for "accept[ing] the named plaintiffs' simplistic 'theory of liability' " upon which plaintiffs' proposed proof is based, *id.* at 16. As the petitioners themselves recognize, however, "consideration of the merits of a plaintiff's claim is not appropriate in determining the propriety of class certification", *id.* at 16, *citing, inter alia, Eisen v. Carlisle & Jacquelin,* 417 U.S. 156, 177 (1974). In *Eisen,* this Court admonished that, " '[i]n determining the propriety of a class action, the question is *not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits* . . . ." 417 U.S. at 178, *quoting Miller v. Mackey International, Inc.,* 452 F.2d 424, 427 (5th Cir. 1971) (emphasis added). Thus, in the primary precedent cited by petitioners, *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation,* 691 F.2d 1335 (9th Cir. 1982), *cert. denied sub nom. California v. Standard Oil Co.,* 464 U.S. 1068 (1984), the Ninth Circuit, while refusing to examine the merits of plaintiffs' claims, simply found that "*any theory* on which [plaintiffs] *might rely* would raise predominantly individual questions", 691 F.2d at 1342 (emphasis added).

By contrast with *Petroleum Products,* in this action, the plaintiffs' theory, upon which they in fact "rely", is that the presence of asbestos-containing products in school buildings creates an unreasonable risk which, when combined with defendants' knowledge or reason to know of the risks, and the class members' asbestos-related expenditures, establishes the defendants' liability for having supplied these products without adequate warnings and testing. Based upon this theory, the merits of the factual premises of which may not be inquired into at the class certification stage, *see Eisen,* 417 U.S. at 177-78; *Jordan v. County of Los Angeles,* 669 F.2d 1311, 1321-22 (9th Cir. 1982), and plaintiffs' presentation to the District Court and

the Third Circuit of the types of proof that they intend to rely upon in support of such theory, both courts below found, at least conditionally, that this theory was susceptible to class-wide proof.

Petitioners' reliance upon their own "assert[ion] that the mere physical presence of an asbestos-containing product does *not* necessarily result in the release of any asbestos fibers or pose any hazard", Petition at 17-18 (emphasis added), is nothing more than a direct affront to *Eisen.*[24] Thus, no conflict with other Circuits is presented, the District Court, as affirmed by the Third Circuit, carefully having followed the standard procedure, recognized by various Circuits, for determining whether a class should be certified under Rule 23.

IV.

THE THIRD CIRCUIT'S DECISION DOES NOT REQUIRE SUPREME COURT REVIEW ON THE GROUNDS THAT A NATIONWIDE CLASS ACTION UNDER STATE LAW CANNOT SATISFY THE RULE 23(b)(3) SUPERIORITY REQUIREMENT

Petitioners also attempt to invoke a *per se* rule against nationwide class actions where the governing substantive law is that of the various states and territories, and thus to argue that the Third Circuit's decision under the superiority requirement of Rule 23(b)(3) "raises important questions of federal precedural law for claims governed by state substantive law and, as

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[24] Indeed, petitioners effectively concede that this objection relates not to the commonality of plaintiffs' proposed proof, but to the *merits* of their theory of liability. Thus, in arguing that the need to apply the law of the various states to plaintiffs' claims precludes the possibility of a finding that the class action is superior to individual litigation, petitioners argue that the predictions of certain states' laws will present an impossible task for the District Court. While this contention is addressed fully below, it is instructive to note that petitioners, in support of this contention, cite as "[o]ne example of this situation . . . the necessity of determining the *legal validity of the 'mere presence' theory of liability* under each state's law". Petition at 28 (emphasis added).

such, merits Supreme Court review." Petition at 20. Apart from ignoring the highly discretionary nature of the "superiority" determination under Rule 23(b)(3), *see School Asbestos*, 789 F.2d at 1011; *Link*, 550 F.2d at 864; *Lerwill v. Inflight Motion Pictures, Inc.*, 582 F.2d 507, 513 (9th Cir. 1978), and the fact that the appellate court affirmed the trial court's exercise of discretion in carefully weighing the relative advantages and disadvantages of a class action over individual litigation, petitioners fail to note that this Court itself has sanctioned the use of a nationwide class action "for claims governed by state substantive law".

In *Phillips Petroleum Co. v. Shutts*, ___ U.S. ___, 105 S.Ct. 2965, 2981 (1985), this Court ruled that a Kansas state court, in certifying a nationwide class of investors, could not apply Kansas law to the claims of *all* class members when the majority of them did not have any connection with Kansas. While the petitioners acknowledge this holding in *Shutts*, Petition at 20, they fail to note that the Court in *Shutts*, upon holding that the law of each jurisdiction in the country would have to be applied to the class members' claims, ordered that the Kansas court, upon remand, would have to apply such varying law, following an "interests analysis" to identify the governing law for each of the class members' claims. Thus, in *Shutts*, the Court sanctioned the use of a nationwide class under the substantive law of every jurisdiction, involving class members "resid[ing] in all 50 states, the District of Columbia, and several foreign countries", even in a state court proceeding.

Recognizing that no blanket prohibition against nationwide classes under multiple states' substantive law in fact exists, petitioners also attack, as somehow in violation of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), the findings of the District Court and the Third Circuit that the variances between the governing state products liability law were limited and that the variances that do exist could be handled through subclasses. However, based upon extensive briefing by plaintiffs, including citations to the governing products liability law of nearly every jurisdiction in the country, the District Court, exercising its discretion under the "superiority" requirement of

Rule 23(b)(3), found that, although the application of the law of each jurisdiction would present substantial problems, subclasses could be used to increase manageability and that, on balance, a nationwide class was "superior" to individual litigation. 104 F.R.D. at 434 (J.A.0000314-15).

On appeal, the Third Circuit noted class plaintiffs' "extensive analysis", finding that they had made a "creditable showing . . . that class certification does not present insuperable problems". *School Asbestos,* 789 F.2d at 1010. Relying in part upon the District Court's practical conclusion that subclasses could appropriately be used to address differences that actually exist, and consistent with its willingness to allow the District Court conditionally to proceed with the Rule 23(b)(3) class, while retaining the option to decertify if that court should become "convinced that the litigation cannot be managed", 789 F.2d at 1011, the Third Circuit concluded that "the effort [to accommodate varying state law] may nonetheless prove successful". 789 F.2d at 1010. Thus, contrary to petitioners' contention, the use of subclasses, as necessary, assures that *each* state's law will in fact be applied, in accordance with *Erie.*

To the same effect is *In re "Agent Orange" Product Liability Litigation,* 100 F.R.D. 718 (E.D.N.Y. 1983), *mandamus denied sub nom. In re Diamond Shamrock Chemical Co.,* 725 F.2d 858, 861 (2d Cir.) ("*Diamond Shamrock*"), *cert. denied sub nom. Diamond Shamrock Chemicals Co. v. Ryan,* 465 U.S. 1067 (1984). In *Agent Orange,* the district court certified a nationwide class consisting of thousands of servicemen in the Vietnam War, and their families, seeking recovery against manufacturers of the defoliant "Agent Orange" for personal injuries allegedly resulting from its use during that war, under the common law of every jurisdiction in the country. In denying *mandamus,* the United States Court of Appeals for the Second Circuit noted the district court's "declared intention to create subclasses as dictated by variations in state law", and concluded that, "[g]iven the unique aspects of this case arguably creating a need for a single dispositive trial on the common issues described above, we cannot say that the use of subclasses corresponding to variations in state law is a palpable

error remediable by mandamus." *Diamond Shamrock*, 725 F.2d at 861. While *Diamond Shamrock* involved a review upon a request for a writ of mandamus, the fact that it found no basis for granting the writ underscores the lack of any "important" question of federal procedural law involved in a discretionary conclusion that a given nationwide class action under potentially varying state products liability law satisfies the "superiority" requirement of Rule 23(b)(3).

Finally, with respect to the petitioners' reliance upon the need for the District Court to "predict" the state law for several jurisdictions as somehow prohibiting the certification of a nationwide class on "superiority" grounds, Petition at 28, they fail to note that the alternative is to have separate courts make each of those predictions. Since each prediction will involve the application of the law to the facts, and invariably the courts in those states which have not ruled on a point will turn to the law of other states which have so ruled, the determination that "superiority" was satisfied, and that a class action therefore should be allowed conditionally to proceed, was not inappropriate.[25]

In sum, the petitioners complain that the "management" of this case presents intractible problems. But "manageability" is peculiarly a matter within the discretion of the district courts which are directly confronted with the challenge of efficiently handling the class actions they certify. For this reason, a district court's judgment that a given case should be attempted as a class action should not be second-guessed on "management" grounds (particularly, as proposed by petitioners herein, a second time), before it has had an opportunity to put to the test the devices at its disposal to facilitate the manageability of that case as such an action.

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[25] The petitioners' contention that the Third Circuit's decision requires the "District Court's unwarranted intrusion upon the products liability laws of the various jurisdictions in this case", Petition at 29, is unfounded because the Third Circuit specifically required compliance with *Erie*. Moreover, even if, in making a prediction of a state's law, the District Court were to err, this prediction would apply only to the affected parties herein and would be nonbinding on the local courts of that jurisdiction.

Thus, the Third Circuit, applying the broad discretion granted the federal courts in making the "superiority" determination under Rule 23(b)(3), found that the District Court had not abused its discretion in concluding that the case should at least be attempted as a class action, with the resolution of any management difficulties a challenge to be handled by the District Court, and the option being left open for the District Court to decertify the class if the action cannot be managed appropriately. The petitioners' disagreement with these two courts is nothing but an objection to the conditional exercise of discretion about a matter over which the District Court will have full control. Such disagreement clearly does not invoke any question warranting a premature review by this Court.

CONCLUSION

For all the above reasons, the Court should deny the request for a writ of certiorari to the Third Circuit Court of Appeals.

Respectfully submitted,

HERBERT B. NEWBERG
(Counsel of Record)
HARVEY S. KRONFELD
GERALD WALLERSTEIN
HERBERT B. NEWBERG, ESQ., P.C.
227 S. 6th Street
Suite 200
Philadelphia, PA 19106
(215) 922-4740

Attorneys for Respondent
Class Representative Barnwell
School District No. 45

DAVID BERGER
(Counsel of Record)
DANIEL BERGER
RUTHANNE GORDON
SHELDON V. TOUBMAN
LORI B. LASSON
DAVID BERGER ATTORNEYS AT LAW
1622 Locust Street
Philadelphia, PA 19103
(215) 875-3000

Of Counsel:
CHARLES ALAN WRIGHT
727 E. 26th Street
Austin, TX 78705
(512) 471-5151

Attorneys for Respondent
Class Representatives School District of Lancaster, Manheim Township School District, Lampeter-Strasburg School District, Board of Education of the Memphis City Schools and Napa Valley Unified School District

ARNOLD LEVIN
LEVIN & FISHBEIN
320 Walnut Street, Suite 600
Philadelphia, PA 19106
(215) 592-1500

STANLEY J. LEVY
LEVY, PHILLIPS & KONIGSBERG
90 Park Avenue
New York, NY 10016
(212) 972-1480

ALVIN B. LEWIS, JR.
HARTMAN, UNDERHILL & BRUBAKER
221 E. Chestnut Street
Lancaster, PA 17602
(717) 299-7254

W. ROBERT MORGAN, SR.
MORGAN, MORGAN, TOWERY, MORGAN & SPECTOR
210 S. First Street
San Jose, CA 95113
(408) 215-7677

DANIEL A. SPEIGHTS
304 Lee Avenue
Hampton, SC 29924
(803) 943-4444

EDWARD J. WESTBROOK
BLATT & FALES
174 E. Bay Street, Suite 100
P.O. Box 1137
Charleston, SC 29402
(803) 577-6747

E. ROBERT WRIGHT
THOMAS, SNELL, JAMISON, RUSSELL, WILLIAMSON & ASPERGER
2445 Capitol Street
Fresno, CA 93721
(209) 442-0600

FRANK J. DAILY
QUARLES & BRADY
411 E. Wisconsin Avenue
Milwaukee, WI 53202-4497
(414) 277-5381

Attorneys for Respondent-Plaintiffs

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